STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2006
v	No. 257980 Wayne Circuit Court
MASADA MURICE KING, Defendant-Appellant.	LC No. 03-009764-01

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, armed robbery, MCL 750.529, carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of life imprisonment for the felony murder conviction, 15 to 30 years' each for the assault with intent to rob, armed robbery, and carjacking convictions, and two to five years' for the felon in possession of a firearm conviction, and a consecutive two-year prison term for the felony-firearm conviction. Because defendant's dual convictions for felony murder and armed robbery violate double jeopardy protections we vacate defendant's conviction and sentence for armed robbery and because we do not find any of defendant's remaining arguments persuasive, affirm in all other aspects.

On August 4, 2003, at about 11:00 p.m., the decedent, Curtis Foster, picked up his girlfriend, Kisha Walker, at her home. Foster drove a few blocks away and parked the car. Walker and Foster noticed defendant and another male walk down the street and approach the car. Defendant pointed a gun in the driver's side window. Defendant ordered Foster out of the car, grabbed him as he was getting out, and shook him down for money, but Foster did not have any. The other male with defendant went to the passenger door, ordered Walker out of the car, and took her money. Walker felt the car shake, saw Foster run away, and saw defendant fire five or six shots at Foster. Walker was told to run, and she did. She ran in the same direction as Foster, who stopped running a few blocks from her house. He had been shot once in the back. As Walker ran, she heard the car door slam and the car start up. Walker ran home and told her father and brother that defendant shot Foster. Walker then crossed the street to a neighbor's home and called the police, who arrived immediately. Foster died as a result of the gunshot wound. Foster's car was found a short distance from where the shooting occurred.

Defendant first argues that the trial court violated his due process right to a fair trial when it erroneously instructed the jury that it could disbelieve defendant based on prior criminal convictions that were irrelevant and inadmissible for impeachment purposes. The prosecution admits that the trial court's instruction was erroneous, but argues that because defense counsel expressed satisfaction with the instruction at trial, defendant waived any right to appellate review of the instructions.

Indeed, expressing satisfaction with a court's ruling or handling of a matter constitutes a waiver of an error, which is a complete relinquishment of the right to appeal the issue. A waiver extinguishes the error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Our review of the record reveals that the trial court elicited the parties' approval of the jury instructions both before and after it instructed the jury. Because defense counsel expressly approved the jury instructions as read, defendant waived his right to appellate review of this issue. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Defendant argues that the prosecutor committed misconduct during closing argument when he attacked defendant's character by making inflammatory references to his biblical name, and in doing so, denied defendant his due process right to a fair trial. Generally, this Court considers issues of prosecutorial misconduct on a case-by-case basis to determine if the defendant received a fair trial. However, because defendant did not object to the prosecutor's remarks at trial, the issue is unpreserved, and this Court's review is for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). The defendant has the burden of establishing prejudice, i.e., that the error affected the outcome of the proceedings. Reversal is warranted only when a plain, forfeited error results in the conviction of an actually innocent defendant or seriously affects the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *People v Allen*, 466 Mich 86, 89-90; 643 NW2d 227 (2002); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The record reveals that in his rebuttal argument, the prosecutor first addressed each of the arguments defense counsel made in his closing argument. Initially, the prosecutor properly argued what he believed were the relevant facts of the case and encouraged the jury not to be distracted by irrelevant issues. A prosecutor is free to argue the evidence and all reasonable inferences that arise from it. *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003). However, the prosecutor then closed his rebuttal argument with the following remarks:

> Lastly, in closing, I submit to you that Mr. King is well named. Masada is a fortress near the Dead Sea. In the first century, the Jews were revolting against the Romans. And Masada is a location [to] which they fled in the year 70 of the first century.
>
> They had been slaughtered in Jerusalem, so they fled. There was a number of zealots that escaped and housed in Masada, this fortress. They held ou[t] for three days. Three years, excuse me. Three years they watched the Romans below as they built their catapults, as they built their battering rams and ladders to get to the fortress until there came a time when they saw the handwriting on the wall and they decide to escape one last time. And that is nine hundred and sixty Jews committed suicide.

> It's just dubious history, the name Masada. But it's symbolic of somebody trying to escape, somebody trying to pull the wool over your eyes. Somebody who will do anything to avoid facing the consequences. That's Masada King.
>
> Don't let him get away with it. Find him guilty of first degree murder. Thank you.

While a prosecutor need not use the blandest of terms in his closing argument, *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001), he may not denigrate "a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). In *Bahoda*, our Supreme Court counseled that the injection of racial or ethnic remarks into any trial is abhorrent because it may arouse the prejudice of jurors against a defendant and lead to a decision based on prejudice rather than on the guilt or innocence of the accused. *Id.*, at 266. But the Court cautioned that reversal is only warranted where it was clear that the comments were intentionally made to arouse the jury's prejudice. *Id*., at 266, 271.

After reviewing the prosecutor's comments, we conclude that the prosecutor's comments overstepped the bounds of propriety. There is no doubt that the prosecutor was not arguing the evidence when he made the challenged comments, but was attacking defendant on the basis of the historical significance of his name. Thus, the question before us is whether the prosecutor's comments prejudiced defendant to the level that reversal is required under plain error review. Defendant cites two cases in support of his argument that reversal is required.

In *People v Quinn*, 194 Mich App 250; 486 NW2d 139 (1992), the prosecutor attacked the defendant's character by arguing that the defendant's testimony regarding drunk driving and drugs showed that he thought nothing of breaking the law. The Court held that reversal was required because the defendant's character was not at issue in the case and the comments may have invoked the juror's prejudices regarding drunk driving or drugs when the defendant's charged crime was not related to those crimes. *Id*., at 253-254. And in *Martin v Parker*, 11 F3d 613, 615-616 (CA 6, 1993), the Sixth Circuit held that the prosecutor's repeated comparisons of the defendant to Adolf Hitler served only to arouse the jury's prejudice and convict on that basis.

After scrutinizing the prosecutor's remarks in context and reviewing relevant case precedent, we conclude that the comments were obviously ill-advised and unfortunate, but it does not appear that the prosecutor was intentionally trying to arouse ethnic prejudices. Although we admonish the prosecutor for making such completely extraneous and foolish remarks, because it does not appear to us that the prosecutor was intentionally trying to arouse ethnic prejudices of the jury, reversal is not required. *Bahoda, supra* 266 n 6. It is very unlikely that the prosecutor's inference that defendant's actions were inevitable because of his given name moved the jury to convict defendant especially in light of the weight of the evidence against defendant in this case. Further, the trial court instructed the jury that the lawyers' arguments were not evidence, which sufficiently dispelled the potential prejudice. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant argues that the trial court violated his constitutional right to be tried by a jury of twelve qualified and sworn jurors, and to an impartial jury, when it replaced a seated juror

with Deborah Montegano, a previously dismissed juror, without ensuring that she was free from outside influence. At trial, after the jury was instructed, but before it began deliberations, lots were drawn to determine which of the thirteen jurors would be excused. The trial court stated, "If your name is called, go into the jury room and retrieve whatever personal items you have and then have a seat right over by the TV." The trial court then "thank[ed] and excuse[d] the juror seated in seat number thirteen, Deborah Montegano." On the second day of deliberations, the trial court received two notes. One stated that the jury was deadlocked and the other stated that one of the jurors was ill. The courthouse was evacuated just after the notes were received due to smoke in the building. When the building was reopened, the trial court was informed that the ill juror was in the hospital and could not continue deliberations. The trial court excused the ill juror with consent from both parties. It was agreed that Montegano would be recalled the following day and deliberations would begin anew. Therefore, the issue of the jury being deadlocked was deemed moot. Montegano was present the following day and the trial court instructed the jury to choose a foreperson again and begin deliberations anew. Both parties expressed satisfaction with the trial court's statement. Subsequently, the jury found defendant guilty as charged.

On appeal, the prosecutor asserts that defendant waived his right to appellate review of this issue when defense counsel expressly approved the trial court's recall of Montegano. In general, trial counsel's decisions such as arguments to pursue, evidentiary objections, and stipulations regarding evidence are solely within trial counsel's purview and thus, in most circumstances, trial counsel can affect waiver. *Carter, supra* at 218-219. But there are certain fundamental rights trial counsel cannot waive without the defendant's express consent. *Id*.

Trial by an impartial jury is a fundamental right. *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981). A defendant also has a constitutional right to be tried by a twelve person jury. Const 1963, art 1, § 20. MCR 6.410(A) specifically provides that in order for a waiver of this right to be valid, the court must personally question defendant on the record to ensure that his waiver is voluntary and intelligent. The parties' stipulation is insufficient to effectuate a waiver. MCR 6.410(A). Our review of the record reveals that the trial court did not engage in any inquiry of defendant and did not seek defendant's personal approval of the replacement juror. Thus, contrary to the prosecutor's argument on appeal, defense counsel's approval of Montegano's recall did not operate to waive defendant's fundamental right to trial by a jury as well as his right to have his guilt or innocence decided by a jury of twelve. However, because defendant did not raise this issue below, we review it for plain error affecting defendant's substantial rights. *Thomas, supra* at 453-454.

Defendant specifically argues that because the trial court had previously excused Montegano and did not follow the procedures prescribed in MCR 6.411, Montegano was no longer a qualified juror able to be recalled to service and his right to a twelve person jury was violated. MCR 6.411 provides the procedures for retaining alternate jurors during deliberations and provides as follows:

> The court may impanel more than 12 jurors. If more than the number of jurors required to decide the case are left on the jury before deliberations are to begin, the names of the jurors must be placed in a container and names drawn from it to reduce the number of jurors to the number required to decide the case. The court may retain the alternate jurors during deliberations. If the court does so, it shall

> instruct the alternate jurors not to discuss the case with any other person until the jury completes its deliberations and is discharged. If an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew.

Defendant assigns errors to the trial court's failure to (1) designate Montegano as an alternate, (2) instruct her not to discuss the case with anyone until the jury had reached a verdict, and (3) question Montegano after recalling her to ensure her impartiality. Indeed, the record clearly shows that the trial court failed to give Montegano the mandatory instruction under MCR 6.411 "not to discuss the case with any other person." This failure constitutes plain error. Thus the issue before us is whether the trial court's plain error in failing to instruct Montegano not to speak with anyone about the case before allowing her to leave the courtroom affects defendant's substantial rights. To answer this question we look to case precedent for guidance.

This Court has addressed whether a defendant's right to trial by jury was violated when the trial court recalled a juror to serve only at the habitual offender phase of the trial. *People v Bettistea*, 173 Mich App 106, 132-133; 434 NW2d 138 (1988). The court rule at the time, MCR 6.102(A), the predecessor to MCR 6.411, only provided that alternate jurors be dismissed after the twelve person jury retired to deliberate. The rule did not provide a procedure for recalling a juror. The *Bettistea* Court found that any error was harmless because the defendant did not object and demonstrated no prejudice. *Bettistea*, *supra* at 133-134. We recognize that unlike the case at bar, in *Bettistea*, the trial court had instructed the juror not to talk to anyone about the case before she was dismissed. *Id*., at 130. We also find instructive a case cited by the *Bettistea* Court, *United States v Hillard*, 701 F2d 1052 (CA 2, 1983). In *Hillard*, the Second Circuit held that the violation of a court rule by impermissibly replacing a juror with an alternate did not require reversal per se, absent a showing of prejudice. *Bettistea, supra* at 133.

After reviewing pertinent case law, we believe that defendant must make an affirmative showing of prejudice in order to demonstrate the trial court's plain error in violating MCR 6.411 affected his substantial rights. The record displays that the trial court had clearly dismissed Montegano, but at the same time retained her as an alternate member of the jury in case her services were needed. Thus, Montegano's dismissal did not render her an unsworn member of the community with no continuing duty to the court and it was incumbent on defendant to present evidence of prejudice. Defendant presented no evidence of prejudice. Thus, without something more, the mere fact that the trial court dismissed Montegano did not automatically render her unable to continue to serve on the jury and defendant is not entitled to reversal.

The next question before us is whether defendant's right to an impartial jury was violated. Defendant asserts that prejudice must be presumed, and the error deemed structural, because after recalling Montegano, the trial court did not question her to ensure her impartiality. In support of his proposition, defendant cites MCR 6.414(A), which provides that the trial court has the responsibility to "take appropriate steps" to ensure that the jury is not exposed to extrajudicial material that might affect its ability to render an impartial verdict.

MCR 6.411 does not require an alternate juror to be questioned when recalled. And, although MCR 6.414(A) directs the trial court to "take appropriate steps" to ensure jurors are able to render an impartial verdict, it does not explicitly explain what "steps" the trial court is required to fulfill. In any event, contrary to defendant's assertion, even if the trial court's failure

to question Montegano is error by operation of MCR 6.414(A), the trial court's error would be nonstructural given that defendant's "right" to an alternate juror instruction stems from a court rule. See *People v Bell*, 473 Mich 275, 293 n 13; 702 NW2d 128, amended 474 Mich 1201 (2005).[1] Thus defendant has not shown that any error would be deemed structural error.

Defendant also asserts that automatic reversal is required because after recalling Montegano, the trial court did not question her to ensure her impartiality and therefore prejudice must be presumed. Defendant specifically argues that in *People v Tate*, 244 Mich App 553, 564; 624 NW2d 524 (2001), this Court, citing *People v Dry Land Marina, Inc*, 175 Mich App 322, 329; 437 NW2d 391 (1989) found no prejudice in a similar situation only because the trial court had instructed the jury on the procedure the alternate was to follow and questioned the recalled juror about her ability to fairly decide the case. *Tate*, *supra* at 566. It is defendant's position that because neither of these occurred in the instant case, prejudice must be presumed and reversal is required.

The precedent cited by defendant is not instructive under the facts of this case because it does not provide any counsel on when, or under what circumstances, prejudice must be presumed. Much more helpful is our Supreme Court's decision in *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997) which holds that that even where there is evidence of juror misconduct, prejudice is not automatic. *Budzyn* directs that in order to establish that an extrinsic influence requires reversal, the defendant must prove not only that the juror was exposed to the extrinsic influence, but also that the exposure "created a real and substantial possibility" that it could have affected the jury's verdict. *Id.* Contrary to defendant's assertions, we can find no basis for presuming prejudice under the facts presented in this case.

Without the presumption of prejudice, the principal issue is whether Montegano's participation in the deliberations prejudiced defendant. In other words, our inquiry is whether there is any evidence that an impartial jury decided defendant's case. Because the issue is an unpreserved, nonstructural error, the burden is on defendant to prove that a plain error affected defendant's substantial rights. *Bell*, *supra* 294-295; *Carines*, *supra* at 774. Defendant asserts that there was no evidence that Montegano was impartial. However, in support of his proposition he only offers the observation that the jury was deadlocked before the trial court recalled Montegano, but returned a guilty verdict the same day Montegano joined the jury deliberations. Without more, simply because the jury was no longer deadlocked after Montegano joined it in deliberations is not evidence of partiality. In fact, without some other evidence, we cannot envision a scenario where the jury's routine act of rendering its verdict is evidence of partiality.

Defendant has not met his burden because he has presented no affirmative evidence that Montegano was in any way partial. Defendant has not shown that Montegano was exposed to

[1] Our Supreme Court has noted that "peremptory challenges are not of constitutional dimension" and "are merely a means to achieve the end of an impartial jury." *Bell*, *supra* 293 n 13. Similarly, instructing an alternate juror not to talk to anyone about the case is yet another means to achieve an impartial jury.

extrinsic influences before the trial court recalled her, and has not shown that any influence affected the jury's verdict. In sum, defendant has presented no evidence to demonstrate that any extraneous influences existed, let alone were substantially related to a material aspect of the case. And he certainly has not shown a direct connection between any extrinsic material and the verdict. *Budzyn, supra* at 89; see also *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998). Defendant has not proven that the trial court's failure to follow one of the procedures outlined in MCR 6.411, or its failure to question Montegano after she was recalled constituted plain error affecting his substantial rights and therefore, defendant is not entitled to reversal on this issue.

Defendant argues that he was denied the effective assistance of counsel at trial. Because defendant did not move for a new trial or a *Ginther*[2] hearing, this Court's review is limited to mistakes that are apparent on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). Defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, defendant must show that his attorney's performance fell below an objective standard of reasonableness under the circumstances and according to professional norms. *Id*., at 687-688; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Next, the defendant must show that this performance so prejudiced him that he was deprived of a fair trial. *Strickland, supra* at 687-688; *Pickens, supra* at 309. To establish prejudice, defendant must show a reasonable probability that the outcome would have been different but for counsel's errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW3d 694 (2000). In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Riley, supra* at 140.

First, defendant argues that his counsel was ineffective for failing to object to an errant jury instruction. Because defendant was charged with felon in possession of a firearm, the parties stipulated that defendant had "a prior felony conviction of a specified nature." The trial court instructed the jury that it could consider defendant's past conviction "only in deciding whether the defendant is a truthful witness." MRE 609 provides, in part, that the credibility of a witness may be attacked through presentation of a prior conviction if that crime involved an element of dishonesty, false statement, or theft. MRE 609(a). Defendant asserts that his prior convictions were for possession of a controlled substance but acknowledges that the jury was never told the nature of his conviction. It is of no consequence though since both parties agree that the trial court's instruction was erroneous. We can fathom no sound trial strategy that would be furthered by approving the trial court's instruction, as defense counsel did.

However, we cannot find defense counsel was ineffective in regard to this issue because defendant has not established a reasonable probability that the outcome would have been different but for counsel's error. There was strong evidence introduced at trial that defendant committed the crimes including evidence that defendant was found at his alleged accomplice's residence with the murder weapon in a nearby box. We also point out that defendant presented an alibi witness, his girlfriend, Cynthia McMillan. The jury's verdict necessarily means that it

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

rejected McMillan's testimony. Based on the record before us, we cannot conclude defendant was prejudiced by counsel's error.

Secondly, defendant argues that his counsel was ineffective because he did not object to the prosecutorial misconduct that occurred during closing arguments. Indeed, we concluded above that the prosecutor's comments were extraneous and foolish remarks. However, we do not conclude defense counsel's failure to object equates to deficient performance. Although the prosecutor's comments may have overstepped the bounds of propriety, their context establishes that the remarks were not an abject attempt to insert ethnic bias into the case. A reasonable attorney could have decided as a matter of trial strategy not to emphasize or call attention to the comments by objecting. Simply because a trial strategy does not work, does not mean that defense counsel was ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defendant has not demonstrated error.

Finally, defendant asserts that his counsel was ineffective in his failure to object to the trial court's handling of Montegano's recall. Defendant also asserts that there could be no sound trial strategy for his counsel's failure to object. To the contrary, it is entirely possible that defense counsel had a favorable view of Montegano. Perhaps, in defense counsel's assessment, Montegano would be sympathetic to defendant and he wanted her as the twelfth juror. Again, simply because a trial strategy does not work, does not mean that defense counsel was ineffective. *Kevorkian, supra* at 414-415. In any event, as we concluded above, defendant presented no evidence to establish that Montegano was partial and that he was prejudiced. Defense counsel was not ineffective.

Defendant argues that his dual convictions for felony murder and armed robbery violate double jeopardy protections and that one of the convictions must be vacated. A double jeopardy claim presents a question of law, which is reviewed de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Defendant was convicted of the felony murder of Foster with the "perpetration or attempted perpetration of a larceny" as the predicate felony. Defendant was also convicted of assault with intent to rob Foster while armed, the armed robbery of Walker, and carjacking of Foster's car. At sentencing, defendant argued that double jeopardy principles prohibited him from being convicted of felony murder and both assault with intent to commit armed robbery and carjacking. The trial court did not find that convictions for all three crimes violated double jeopardy principles. Defendant argues on appeal that the uncharged crime of "*a*" larceny cannot be the predicate felony for felony murder. Therefore, he asserts that one of his other theft-related convictions must be the predicate felony.

The double jeopardy provisions of the United States and Michigan Constitutions protect citizens from multiple prosecutions for the same offense. *Herron, supra* at 599. It is a violation of double jeopardy protections to convict a defendant of both felony murder and the predicate felony because the evidence necessary to prove felony murder requires proof of the underlying lesser-included felony. *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981).

"Larceny of any kind" can be a predicate felony to felony murder. MCL 750.316(1)(b). Here, the trial court instructed the jury, in part, that in order to find defendant guilty of felony murder it had to find that defendant took "someone else's property." Thus, one of defendant's larceny-related convictions need not be the predicate felony, but the jury did need to find that defendant stole *something*, either Foster's car or Walker's money. We note that although the

information listed "perpetration or attempted perpetration of a larceny" as the predicate felony, plaintiff's argument below and on appeal refers only to larceny, a completed act. And the trial court instructed the jury on only a completed act of larceny. Therefore, it is not appropriate to consider attempted larceny as an alternate predicate felony.

The prosecutor argues that because defendant was not convicted of the separate crime of larceny, there is no double jeopardy issue. However, where one offense is a necessarily included lesser offense of the other, conviction of and sentence for both violates double jeopardy. *Wilder, supra* at 343-344. Therefore, defendant's convictions would violate double jeopardy if larceny is a necessarily included lesser offense of one or more of his convictions. To be a necessarily included lesser offense the elements of the lesser offense must be completely subsumed in the greater offense. *People v Walls*, 265 Mich App 642, 645; 697 NW2d 535 (2005).

Larceny is a necessarily included lesser offense of armed robbery. *People v Chamblis*, 395 Mich 408, 424-425; 236 NW2d 473 (1975), overruled in part on other grounds in *People v Cornell*, 466 Mich 335, 646 NW2d 127 (2002). But larceny is not a necessarily included lesser offense of carjacking because carjacking does not require the intent to permanently deprive. *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998). Larceny requires this intent. *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004). And because larceny is a completed act, larceny is not a necessarily included lesser offense of assault with intent to rob while armed.[3] The latter offense does not require a completed theft. MCL 750.89.

Therefore, if the jury found that the larceny was in relation to Walker's money, then the armed robbery conviction cannot stand. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). However, if the jury found that the larceny was in relation to Foster's car, then the carjacking conviction can stand. The armed robbery conviction would also stand because it related to Walker, while the larceny related to Foster. Double jeopardy does not apply to crimes committed against different victims. *People v Hall*, 249 Mich App 262, 273; 643 NW2d 253 (2002). Although the prosecution argued during closing argument that the larceny related to Foster's car, it is not apparent from the jury's verdict that the jury relied on the larceny related to the car rather than to Walker's money to establish the predicate felony element of felony murder.

The proper remedy is to resolve the issue in defendant's favor. When a jury's verdict is uncertain, a defendant may be entitled to appropriate relief. *People v Ullah*, 216 Mich App 669, 683; 550 NW2d 568 (1996). In *People v Smith*, 383 Mich 576; 177 NW2d 164 (1970), the defendant was charged with five possible verdicts. Option two was "assault with intent to commit rape" and option four was "assault and battery." When the clerk questioned the jury, the foreman indicated that the jury had found the defendant guilty of "assault with intent." The trial court entered a judgment for assault with intent to rape. *Id.*, at 577-578. The Supreme Court held that the only verdict that could be clearly deduced from the record was "assault with intent"

[3] Attempted larceny can be the predicate felony of felony murder and is a necessarily included lesser offense of assault with intent to rob while armed. But it is clear from the information and the jury instructions that the prosecution relied on a completed offense as the predicate felony.

and it affirmed the Court of Appeals judgment that reduced the conviction to simple assault. *Id*., at 578-579. Therefore, defendant is entitled to have his armed robbery conviction and sentence vacated.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly